HONG LEONG FINANCE BHD

v.

THAMILCHELEVAN PALINESAMY & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: J-04-70-1996]
5 FEBRUARY 2002

CONTRACT: *Guarantee - Dealer's contract of guarantee under hire-purchase agreement - Whether contravened Hire-Purchase Act 1967 - Whether void - Whether enforceable at common law*

This was an appeal by the appellant finance company against the decision of the learned High Court judge who affirmed the finding of the sessions court that the guarantee given by the second respondent dealer to the appellant finance company under a hire purchase agreement was a nullity. The principal ground on which the learned judge held the contract of guarantee void was that it contravened the Hire-Purchase Act 1967 ('the Act').

Held:
Per Gopal Sri Ram JCA

[1] Although the guarantee did not come within the expression "contract of guarantee" under s. 2(1) of the Act, it was not automatically void and unenforceable. There is no provision in the Act that declared it so. A court is not entitled to strike down a contract or other transaction as being prohibited by statute unless that is the inevitable conclusion to be arrived at upon a proper construction of the statute in question. (pp 284 f-i & 285 a)

[2] The Australian case of *Daly v. Roth* did not decide that a dealer's guarantee was void because it fell outside the Act. It is authority for the proposition that a dealer's guarantee, though falling outside the purview of the Act, may be enforced at common law. It was held therein that it was not the intention of the legislature to abrogate the ordinary common law relationship of guarantor or guarantee, but merely to exclude a certain class of guarantors from the benefits of the Act concerned. A guarantee coming within that class was still held to be liable at common law. (p 286 b-g)

[3] It is apparent that Parliament wished to follow in the steps of the Australian State Legislatures. That is why it has chosen to deprive dealers of the protection accorded by the Act to ordinary guarantors. But it was never the intention of Parliament to strike down a dealer's contract of guarantee. It followed, therefore, that the learned judge erred in his interpretation of the Act. (pp 286 h-i & 287 a)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan oleh syarikat kewangan perayu terhadap keputusan hakim Mahkamah Tinggi yang bijaksana yang telah mengikrarkan keputusan mahkamah sesyen bahawa gerenti yang diberikan oleh peniaga responden kedua kepada syarikat kewangan perayu di bawah satu perjanjian sewa beli adalah batal. Alasan utama di atas yang mana hakim yang bijaksana memutuskan kontrak gerenti tersebut batal adalah bahawa ianya melanggari Akta Sewa Beli 1967 ('Akta tersebut).

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Meskipun gerenti tersebut tidak terlingkung di dalam ungkapan "kontrak gerenti" di bawah s. 2(1) Akta tersebut, ianya tidak secara otomatik batal dan tidak boleh dikuatkuasakan. Tidak terdapat sebarang peruntukan di dalam Akta tersebut yang mengisytiharkannya sedemikian. Sesebuah mahkamah tidak berhak untuk membatalkan sesuatu kontrak atau transaksi lain sebagai dilarang oleh statut melainkan itulah kesimpulan yang tidak dapat dielakkan atas pentafsiran sempurna statut yang dipersoalkan.

[2] *Daly v. Roth* sebuah kes Australia tidak memutuskan bahawa gerenti peniaga adalah batal kerana ianya terkeluar daripada bidang Akta tersebut. Ianya merupakan otoriti untuk proposisi bahawa sesuatu gerenti peniaga, meskipun tidak terlingkung di dalam Akta tersebut, boleh dikuatkuasakan menurut common law. Adalah diputuskan di dalamnya bahawa ianya bukan niat badan perundangan untuk mengabrogasikan perhubungan common law biasa penggerenti atau sesuatu gerenti, tetapi hanya untuk mengecualikan kelas penggerenti tertentu daripada mendapat kemanfaatan dari Akta yang berkenaan. Sesuatu gerenti yang terlingkung di dalam bidang kelas itu masih bertanggungan menurut common law.

[3] Ianya adalah jelas bahawa Parliamen ingin mengikuti langkah-langkah Perundangan Negeri Australia. Itulah sebabnya mengapa ianya telah memilih untuk melucut hak peniaga-peniaga dari perlindungan yang harus diberikan oleh Akta tersebut kepada penggerenti-penggerenti biasa. Tetapi ianya tidak pernah menjadi niat Parliamen untuk membatalkan kontrak gerenti seseorang peniaga. Diikuti bahawa, dengan itu, hakim yang bijaksana telah tersalah pertimbangan dalam pentafsiran Akta tersebut.

[Rayuan dibenarkan.]

Case(s) referred to:
Co-operative Central Bank Ltd (in receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(foll)***
Daly v. Roth [1956] WN (NSW) 270 ***(foll)***
Guthrie & Anor v. Motor Credits Ltd [1963] 37 ALJR 167 ***(foll)***
Wong Thin Yit v. Mohd Ali [1974] 1 MLJ 1 ***(refd)***

Legislation referred to:
Hire Purchase Act 1967, s. 2(1)

For the appellant - Clarence Edwin; M/s Abdul Raman Saad & Assoc
For the respondent - KS Dass; M/s K Sila Dass & Partners

[Appeal from High Court, Johor Bahru; Civil Appeal No; 12-55-1993]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:
This appeal concerns the law of hire purchase. So far as I am aware, there is no reported Malaysian case on the point at issue here. Certainly none was cited to us during argument.

It is not necessary to recall the facts in any detail. They have been discussed by the learned intermediate appellate judge, Abdul Malik Ishak J with his usual thoroughness. His judgment affirming the Sessions Court is reported in [1996] 1 CLJ 471. There is no attempt by the appellant to re-open the facts. That would have proved a most onerous task. It is the practice of courts of second appeal not to interfere with concurrent findings of fact save in the rarest of cases. See, *Wong Thin Yit v. Mohd Ali* [1974] 1 MLJ 1.

But here there is only an issue of law. It is whether the guarantee given by the second respondent dealer to the appellant finance company is a nullity. The sessions court held that it was. The High Court affirmed that finding. The principal ground on which the learned judge held the contract of guarantee void was that it contravened the Hire Purchase Act 1967 ("the Act"). That appears from three passages in his judgment. The first is at p. 55 of the record of appeal (p. 480 of the report) where he says:

> As a dealer, the second respondent is barred from entering into a contract of guarantee with the appellant, and this seems to be the very essence of the agreement entered between the appellant and the dealer. **That which is not allowed by law will consequently be held to be null and void and of no effect.** (emphasis added.)

The second passage is at p. 56 of the record (also p. 480 of the report):

> But what is of utmost importance here is whether the contract of guarantee entered under the Act can be enforced against the dealer. As the law now stands, a contract of guarantee by the dealer to the appellant cannot be enforced by this court for the simple reason that it contravenes the Act.

The third and final passage is at p. 57 of the record:

> Here, it was agreed that the dealer acted as a sales executive with Cycle & Carriage and the Mercedes Benz from Cycle & Carriage was sold to Thamil on hire purchase provided by the appellant, and the dealer acted as a guarantor. under the hire-purchase agreement and for that reason it offended against the Act. Put differently, the guarantee agreement in its present form, is a worthless piece of paper that cannot be enforced in a court of law.

The learned judge held that the guarantee in the present case does not come within the expression "contract of guarantee" as defined by the Act. I agree entirely with that conclusion. It is borne out by the definition contained in s. 2(1) of the Act which reads as follows:

> contract of guarantee means in relation to any hire-purchase agreement, a contract made at the request, expressed or implied, of the hirer to guarantee the performance of the hirer's obligations under the hire-purchase agreement, but does not include the dealer or a person engaged at the time of giving of the guarantee in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement, and the expression 'guarantor' shall be construed accordingly.

But I am, with respect, unable to agree with the learned judge's argument that it follows from that premise that a guarantee given by a dealer is, automatically and without more, void and unenforceable. In other words, it does not follow that because the present guarantee falls outside the statutory definition, it is

void and unenforceable. I can find no provision – there is indeed none – in the Act that so declares. And it is now settled by the high authority that a court is not entitled to strike down a contract or other transaction as being prohibited by statute unless that is the inevitable conclusion to be arrived at upon a proper construction of the statute in question.

In *Co-operative Central Bank Ltd (in receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300 at p. 307, Edgar Joseph Jr. FCJ said:

> Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. (See *Holman v. Johnson* [1775] 98 ER 1120 at p. 1121; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57.) However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute. This point was aptly put by Gibbs CJ in *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410 thuswise:
>
> > It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. *Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.* (emphasis added.)

In *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd* [1994] 2 CLJ 143, a case where the validity of a contract entered into in breach of s. 45(1) of the Banking and Financial Institutions Act 1989, was in question, we had occasion to quote with approval the above passage in the judgment of Gibbs CJ.

We have also read with much profit the judgment of McPherson J in *JC Scott Constructions v. Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd 413.

We note that Greig and Davis on the Law of Contract, at pp. 1117ff, say that they see a trend in decisions whereby courts are now less ready to find a contract illegal or unenforceable simply by reason of a statutory provision.

The foregoing passage and the authorities referred to therein make it abundantly clear that statutory prohibition is a threshold postulate for a court to act. The learned judge recognised this in the first passage of his judgment earlier quoted to which emphasis has been lent.

I am also persuaded by the appellant's argument that *Daly v. Roth* [1956] WN (NSW) 270, referred to by the learned judge in his judgment does not decide that a dealer's guarantee is void because it falls outside the Act. In fact, it is authority for the proposition that a dealer's guarantee, though falling outside the purview of the Act may be enforced at common law. Thus, in *Daly*, Stephen DCJ said:

> What of guarantors? Some, and the more substantial benefits being bestowed on purchasers are granted to guarantors by s. 8(4). But certain class of guarantor is not intended so to benefit. If he is "engaged at the time of giving the guarantee in the trade or business of selling goods of the same nature or description as the goods referred to in the hire-purchase agreement" (s. 2) he is not deemed a guarantor or to have the benefit of s. 8(4). He has had experience in the particular trade and no doubt has also had experience of hire-purchase transactions within it, but a friend or business associate who has no such experience and who guarantees the purchaser merely out of his faith in the latter's integrity should be, and is in fact, protected. Such I believe to have been the intention of the legislature. I believe this to be the explanation of the rather curious definition of "guarantor" in s. 2, particularly as there is no reference to a "guarantor" anywhere in the Act except in ss. 2 and 8. I do not consider that the intention of the legislature as expressed by its language was to abrogate the ordinary common law relationship of guarantor or guarantee, but merely to exclude a certain class of guarantor from the benefits of the Act. A guarantee coming within that class is still, I consider, liable as at common law. That I believe to be the true construction and effect of the legislation. In any event I am of opinion that the language of the Act is not so clear and unambiguous as to result in interference with common law rights and obligations in such a case. The construction I have adopted does, I feel, give a practical commonsense and logical effect to the legislation whereas the opposite construction would have somewhat peculiar effects.

The judgments of Kitto and Windeyer JJ in *Guthrie & Anor v. Motor Credits Ltd* [1963] 37 ALJR 167 are equally instructive and point in the same direction.

The Australian cases are of particular assistance because our Act is based on the hire-purchase legislation of some of the States of Australia. It is apparent that our Parliament wished to follow in the steps of the Australian State Legislatures. That is why it has chosen to deprive dealers of the protection accorded by the Act to ordinary guarantors. But it was never the intention of Parliament to strike down a dealer's contract of guarantee.

It follows from what I have said thus far that the learned judge erred in his interpretation of the Act. The appeal is therefore allowed. The orders of the courts below dismissing the appellant's claim are set aside. Judgment is entered for the appellant in terms of prayers (a), (b) and (c) of its statement of claim. The costs incurred at all levels of these proceedings shall be taxed and paid by the second respondent. Deposit to be refunded to the appellant.

My learned sister Siti Norma Yaakob and my learned brother Denis Ong Jiew Fook, JJCA have read this judgment in draft and have expressed their agreement with it.